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**OFFICE OF ADMINISTRATIVE LAW JUDGES**

**WASHINGTON, D.C. 20424-0001**

IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES  
DISTRICT,

LOS ANGELES, CALIFORNIA

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 505,  
AFL-CIO

Case No.  
SA-CA-20442

Charging Party

Dorothy Dunkel-Bradley, Esq.

For the Respondent

James Humble-Sanchez

For the Charging Party

R. Timothy Sheils, Esq.

For the General Counsel

Before: SALVATORE J. ARRIGO

Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Upon an unfair labor practice charge having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the San Francisco Regional Office, issued a Complaint and Notice Hearing alleging Respondent violated the Statute by involuntarily reassigning the Union President to a different working unit and charging the Union President with one day absence without leave (AWOL) because he engaged in activity protected by the Statute.

A hearing on the Complaint was conducted in Los Angeles, California at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

#### Findings of Fact

At all times material the National Immigration and Naturalization Council, American Federation of Government Employees, AFL-CIO (herein AFGE) has been the exclusive collective bargaining representative of various of Respondent's employees and AFGE Local 505 has been the agent of AFGE for the purpose of representing those employees.

Respondent's Investigations Branch is comprised of approximately 150 special agents who are employed in three sections: the Employer Sanctions Unit (ESU); the Alien Criminal Apprehension Unit (ACAP); and the Fraud Unit. ESU investigates the illegal hiring of aliens; ACAP is primarily responsible for locating and removing criminal aliens from the United States; and the Fraud Unit, among other things, investigates the counterfeiting of Immigration and Naturalization Service (INS) and Social Security documents to circumvent INS laws. Beginning in early 1991 John Brechtel, Assistant District Director in charge of the Investigations Branch, effectuated generally a policy of rotating agents through the three units for training purposes. Rotation, when effectuated, coincided with employee annual appraisals given each April and the specific agents to be rotated were designated by Brechtel after consultation with his deputy and the section chiefs. Brechtel testified that while he attempts to use 18 months as a "benchmark" for duration in a unit, it is not a "hard and fast" system. Testimony and record evidence reveals that although rotation of agents is an ongoing annual event, numerous employees have remained in a unit for extensive periods of time and rotation frequently depends upon the level of experience necessary to be maintained in a unit, current work demands, the existence of protracted investigations and, to an extent, the desires of the agent. Indeed a number of agents, although having substantial service in the Branch, have only worked in two of the three units during their entire tenure of employment.

After being employed by Respondent, James Humble-Sanchez worked in ESU beginning in July 1988 until

October 1989 when he was assigned to the ACAP Unit. On December 7, 1991 Humble-Sanchez became President of Local 505. The Union had been previously "dormant." After becoming Union President, Humble-Sanchez processed numerous grievances through arbitration and filed over a dozen unfair labor practice charges against Respondent by April 1992. During this period Humble-Sanchez used up to approximately 90 percent of his workweek on official time pursuing Union representational activities. His work in ACAP consisted of interviewing prison inmates in search of criminal aliens. In performing these duties Humble-Sanchez was able to schedule his work in advance and his frequent requests for official time were always granted.

Sometime in mid to late March 1992 Assistant District Director Brechtel informed Humble-Sanchez that he was going to be reassigned to the Fraud Unit. Humble-Sanchez expressed the belief that in the Fraud Unit, which is a "time-intensive" unit where it is difficult to schedule nonwork activities in advance, he would not be allocated the official time he needed to perform his duties as Union President. Brechtel replied that Humble-Sanchez was being rotated to Fraud for the betterment of his career and he didn't care if Humble-Sanchez was the Local Union President, he was hired as an agent and would be held accountable for his work performance regardless of his Union activities. Humble-Sanchez said that it was his impression that the Agency would take into consideration the amount of time he spent on Union activities when appraising him.<sup>(1)</sup> Brechtel indicated that a union President and Vice-President in New York had been terminated and Humble-Sanchez told Brechtel that a District Director in Houston had been removed, the Deputy District Director demoted and the "ADDI" given a 30 or 45-day suspension.<sup>(2)</sup>

According to Humble-Sanchez, around this same time he was talking to his ACAP supervisor, George Walko, when Humble-Sanchez asked Walko why he thought he was being transferred to the Fraud Unit. Walko responded: ". . . they're doing that to control your time." Shortly thereafter Humble-Sanchez asked the same question to Walko's supervisor, Gilbert Reeves, who replied that the reason was "obvious", and that's where they could keep an eye on Humble-Sanchez and control his time. Neither Walko nor Reeves were called to testify.

Humble-Sanchez was transferred to the Fraud Unit on April 6, 1992 and assigned to a squad investigating the printing and selling of fraudulent documents. Normally a majority of the squad is used for safety purposes when an undercover purchase or "buy" is made. These "buys" occur two to three times a week and the assignment would last two to ten hours. Immediately after beginning in the Fraud Unit, Humble-Sanchez' immediate supervisor, James Goss, and his second-line supervisor, William Griffen, told him, on separate occasions, that he would not be allocated the amount of official time for Union representational activities he had received in the past and would have to change the way he conducted Union business and delegate since he would not have the same time available as previously.

The record reveals that shortly after beginning in Fraud, Humble-Sanchez approached Deputy Director Brechtel and told him he was happy to be in the Fraud Unit and thought the rotation would "work out" and would be good experience and good for his career. Similar sentiments were expressed to Supervisor Goss.<sup>(3)</sup> However, after a couple of weeks, more and more of Humble-Sanchez' request for official time were denied by Supervisor Goss because of the need for Humble-Sanchez' presence at Fraud Unit investigations and arrests. Humble-Sanchez thereafter requested he be transferred out of the Fraud Unit, back to ACAP, so he could perform Union representational work, but Respondent refused to grant his request.<sup>(4)</sup>

On April 17, 1992 Humble-Sanchez approached Supervisor Goss at his desk and asked if he could take

annual leave on April 21 to attend a Federal Bar Association Awards Ceremony and Luncheon. Humble-Sanchez had been invited to the affair by an arbitrator and an attorney who were seeking the Union's business and the attorney provided him with a ticket. Frank Johnson, another supervisor, was sitting at a desk next to Goss and asked Humble-Sanchez where he was going. Humble-Sanchez replied that he was going to the awards affair, and in response to Johnson's inquiry, told Goss and Johnson that he received the ticket through personal union contacts. Johnson asked how he was going to get to the affair and Humble-Sanchez said he planned to drive his personal automobile. Johnson stated that a large number of Fraud Unit employees were also going but on administrative leave and using government cars. Humble-Sanchez asked if he could use administrative leave and a government car but was refused because he wasn't on the squad of the agent receiving an award. Goss approved Humble-Sanchez' request to take annual leave to attend the affair.<sup>(5)</sup>

Humble-Sanchez attended the awards luncheon on April 21, 1992 taking about 4 and 1/2 hours of annual leave for the occasion. At the banquet Deputy Director Brechtel saw Humble-Sanchez and asked Supervisor Goss if he had given Humble-Sanchez permission to be at the affair and was told by Goss that he had not.<sup>(6)</sup> On the next day Goss sent the following memorandum to Humble-Sanchez:

On April 21, 1992 you were observed at the Federal Bar Association Awards Ceremony and Luncheon. As you were in District scheduled training, you are to provide the following information to me by 12:00 P.M., April 23, 1992.

From whom did you obtain your ticket to the ceremony?

What method of transportation did you use to travel to and from the Century Plaza Hotel?

From whom did you receive permission to leave the training class and attend The Federal Bar Association Awards Ceremony and Luncheon?

Within an hour and a half after receiving the Goss memorandum, Humble-Sanchez approached fellow agent and Union Vice-President Steve Martin and told him that he had received prior approval of annual leave to attend the awards ceremony from Goss and Goss was now denying it. Humble-Sanchez told Martin that Supervisor Frank Johnson had witnessed the approval and asked Martin to listen to a conversation he was going to have with Johnson, hoping Goss had not yet contacted Johnson. Shortly after, Humble-Sanchez and Martin met Johnson by a photocopy machine and Humble-Sanchez mentioned the conversation the prior week concerning annual leave. Johnson acknowledged recalling the conversation and asked whether Humble-Sanchez finally decided on administrative or annual leave. Humble-Sanchez replied he took annual leave and drove his own car and Johnson indicated that was the best way to avoid controversy.

On April 23, 1992 Humble-Sanchez sent the following memorandum to Goss:

Pursuant to our conversation on April 17, 1992, I requested and received approval for Annual Leave to attend the Federal Bar Association Awards Ceremony and Luncheon. The ticket was obtained through a personal business contact. The method of transportation was not by Government Vehicle. The class instructor, Ms. Norene Skarvoones was advised of the situation and approved.<sup>(7)</sup>

Goss notified Humble-Sanchez on April 29, 1992 that he was being charged with being AWOL for and 4 1/2 hours for leaving scheduled training and attending the Federal Bar Association Awards Ceremony and Luncheon without leave being granted.

### Additional Findings, Discussion and Conclusions

Counsel for the General Counsel alleges Respondent violated section 7116(a)(1) and (2) of the Statute by transferring Union President Humble-Sanchez into the Fraud Unit in order to curtail his use of official time pursuing representational activities, and placing Humble-Sanchez on AWOL after permitting him to attend an awards affair in retaliation for his protected activity and in an attempt to control and intimidate the Union's President.

Counsel for Respondent denies Respondent violated the Statute and essentially contends Humble-Sanchez was transferred in the normal course of employee developmental rotation and suggests that no credible evidence of hostility towards the Union exists. Counsel for Respondent further takes the position that Humble-Sanchez was not engaged in any activity protected by the Statute when he was charged with AWOL when attending the awards affair.

In Letterkenny Army Depot, 35 FLRA 113 (1990), the Authority established the analytical framework for evaluating alleged discrimination violations of the Statute. In such cases the General Counsel must first establish a prima facie case by showing that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other condition of employment. Letterkenny at 118. After the General Counsel makes the required prima facie showing of discrimination based on protected activity, an agency will be found to have violated section 7116(a)(2) of the Statute unless the agency can demonstrate, by a preponderance of the evidence, that there was a legitimate justification for its action and the same action would have been taken even in the absence of the protected activity. Id.

In the case herein the record clearly discloses that Humble-Sanchez was openly and rigorously engaged in protected activity, using substantial amounts of official time provided by Respondent for that purpose. With regard to Humble-Sanchez' transfer from the ACAP Unit to the Fraud Unit, while such action could have been effectuated simply to provide Humble-Sanchez with greater experience in the Agency, as was the case with various other agents, the evidence discloses that Humble-Sanchez was transferred to curtail his engaging in protected activity since the very nature of the work in the Fraud Unit made planning and scheduling for Union representational duties impractical if work in the Fraud Unit was to be accomplished. Thus, Humble-Sanchez testified, without contradiction, that he was informed by Respondent's supervisors Walko and Reeves that the reason he was being transferred was in order for management to control and diminish the amount of time Humble-Sanchez was spending on Union representational activities.

This credited testimony, I find, provides the evidence of the true motivation behind Humble-Sanchez' transfer. Counsel for Respondent urges such testimony by Humble-Sanchez relating what supervisors Walko and Reeves told him was "self-serving" and suggests it was incumbent upon counsel for the General Counsel to have called the two supervisors as witnesses "to verify the veracity of Mr. Humble-Sanchez' testimony." Counsel for Respondent misplaces the obligation to produce Respondent's supervisors to support a contention.

I find that once the evidence established that Respondent's supervisor acknowledged to the discriminatee the motivation for Respondent's action, it thereafter became Respondent's obligation to call its supervisors as witnesses to support its position with regard to the reason for Humble-Sanchez' transfer. Absent the presentation of such witnesses, I infer that, if called, the testimony of Respondent's supervisors would have been adverse to Respondent's case. It is well settled that in such circumstances an adverse inference may be drawn regarding the factual matters at issue. See International Automated Machines, Inc., 285 NLRB 1122 (1987) citing, inter alia, Greg Construction Co., 277 NLRB 1411, 1419 (1985); Hadbar, Division of Pur O Sil, Inc., 211 NLRB 333, 337 (1974); and Marvin F. Hill Jr. and Anthony v. Sinicropi, Evidence In Arbitration, at 102 (The Bureau of National Affairs, 2d ed., 1987).

With regard to Respondent's placing Humble-Sanchez on AWOL for attending the awards luncheon, credited testimony reveals that Humble-Sanchez asked permission from Goss, his supervisor, and was granted that permission. Thereafter Goss treated the matter as though he had not granted Humble-Sanchez permission and disciplined him with a declaration of AWOL for time spent at the awards affair. Respondent contends that Humble-Sanchez was not engaged in any conduct protected by the Statute when he attended the affair and therefore no violation of the Statute could occur from Respondent's placing him on AWOL. However, as found herein, Respondent, through Goss, gave permission for Humble-Sanchez to attend. That permission was witnessed by Supervisor Johnson, whose subsequent acknowledgement of this fact to Humble-Sanchez was heard by employee Martin. Thus Goss' denial of giving Humble-Sanchez permission to attend the affair is not credited. Goss' conduct occurred against a background of Humble-Sanchez being transferred to the Fraud Unit to interfere with his representation activity in violation of the Statute. In these circumstances Goss' falsification concerning placing Humble-Sanchez on AWOL supports an inference that Respondent had an unlawful motive for the action, and I so find. See Pension Benefit Guaranty Corporation, 39 FLRA 905, 930 (1991); United/Bender Exposition Service, 293 NLRB 728, 732 (1989); and Party Cookies, Inc., et al., 237 NLRB 612, 623 (1978).

In sum, I find and conclude Respondent discriminated against Union President Humble-Sanchez and thereby violated section 7116(a)(2) of the Statute: by transferring Union President Humble-Sanchez to the Fraud Unit in April 1992; and by putting Union President Humble-Sanchez on AWOL for attending the Federal Bar Association Awards Ceremony and Luncheon. I further find and conclude that by such conduct Respondent interfered with, restrained, and coerced employees in their right to engage in activity protected by the Statute in violation of section 7116(a)(1) of the Statute.<sup>(8)</sup> Accordingly, I recommend the Authority issue the following:

#### ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Immigration and Naturalization Service, Los Angeles, California, shall:

1. Cease and desist from:

(a) Discriminating against James Humble-Sanchez or any other employee because the employee has engaged in activity protected by the Federal Service Labor-Management Relations Statute on behalf of the

American Federation of Government Employees, Local 505, AFL-CIO, the agent of the exclusive collective bargaining representative.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise their rights guaranteed by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Upon request, rescind the transfer of special agent James Humble-Sanchez from the Alien Criminal Apprehension Unit to the Fraud Unit and return him to the duties he performed in the Alien Criminal Apprehension Unit prior to the transfer.

(b) Make whole James Humble-Sanchez for the many losses he may have incurred as a result of being placed in AWOL status for April 21, 1992.

(c) Remove from all records relating to James Humble-Sanchez any reference to his being placed in AWOL status for April 21, 1992.

(d) Post at the Immigration and Naturalization Service, Los Angeles District, Los Angeles, California facilities, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Los Angeles District Director and shall be posted and maintained for a period of 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the San Francisco Regional Office, Federal Labor Relations Authority, in writing, within 30 days of this Order as to what steps have been taken to comply herewith.

Issued, Washington, DC, May 5, 1994

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SALVATORE J. ARRIGO

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminate against James Humble-Sanchez or any other employee because the employee has engaged in activity protected by the Federal Service Labor-Management Relations Statute on behalf of the American Federation of Government Employees, Local 505, AFL-CIO, the agent of the exclusive collective bargaining representative.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of rights guaranteed under the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, rescind the transfer of special agent James Humble-Sanchez from the Alien Criminal Apprehension Unit to the Fraud Unit and return him to the duties he performed in the Alien Criminal Apprehension Unit prior to the transfer.

WE WILL make whole James Humble-Sanchez for the many losses he may have incurred as a result of being placed in AWOL status for April 21, 1992.

WE WILL remove from all records relating to James Humble-Sanchez any reference to his being placed in AWOL status for April 21, 1992.

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Activity



Dated: \_\_\_\_\_ By: \_\_\_\_\_

(Signature)

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, San Francisco Regional Office, 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is (415) 744-4000.

1. Respondent accommodated Humble-Sanchez' Union duties in his job with ACAP by giving him assignments with a light

workload which left him available to engage in his representational obligations.

2. I was not impressed with Humble-Sanchez' testimony regarding the specifics of this conversation or the context in which certain statements were allegedly made. Brechtel had no recollection of the conversation.

3. Humble-Sanchez acknowledge telling management something to the effect that he was "happy" to be going into the Fraud Unit but testified that he only did so to be "politically correct" in an effort to foster a good job relationship.

4. The unfair labor practice charge herein was filed in early May 1992 and in October or November 1992 Humble-Sanchez' work assignments in the Fraud Unit were so arranged that thereafter he had sufficient time to attend to Union representational activities.

5. The above account is taken from the testimony of Humble-Sanchez which I credit. Goss denied any such meeting occurred prior to the banquet and Johnson was not called to testify in this proceeding.

6. Brechtel had given permission for attendance of the other agents who were present at the banquet.

7. Humble-Sanchez testified, without contradiction, that on April 17 after Goss approved his request for annual leave, he went to training class instructor Skarvoones and was granted permission from her to be absent from training to attend the ceremony and luncheon.

8. Respondent's unsupported contention that the conduct herein found to be violative of section 7116(a)(2) of the Statute does not also violate section 7116(a)(1) of the Statute is contrary to longstanding settled law and therefore rejected.